CONSOLIDATED SEPARATE STATEMENT OF COMMISSIONER KEVIN J . MARTIN, CONCURRING IN PART AND DISSENTING IN PART

Re: *James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area*, Decision, WT Docket No. 94-147; *Marc Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area*, Decision, WT Docket No. 97-56

I dissent in large part from this item. I am unwilling to approve, based on the conflicting and confusing record before us, the determination that James A. Kay, Jr. improperly failed to respond to requests for information and that Kay and Marc Sobel lacked candor in filings they made to the Commission. In the information request decision, the Commission reverses an ALJ's explicit findings that Kay acted reasonably in the face of a demanding inquiry by the Bureau – findings that are ordinarily accorded great deference. In the lack of candor decision, upon which two ALJs reached opposite conclusions, the Commission essentially sides with the first ALJ, even though he did not have accurate information on all of the relevant facts. In my view, the Commission does itself a disservice by making these decisions on the cold record before it. At the very least, the Commission should have referred this proceeding to a new ALJ to reconcile the conflicting decisions and make definitive findings.

I. Failure To Respond to Commission Inquiries

This case began as an investigation into whether Kay was falsely reporting the number of mobile units he served in order to avoid certain channel sharing and recovery rules. Having received several complaints making such allegations, the Wireless Bureau served Kay with a request for information. A lengthy exchange ensued, in which Kay and the Bureau wrestled over what information Kay would provide and when he would provide it. Kay's actions during the course of this exchange are the basis for the Commission's determination that Kay improperly failed to respond to the Bureau's inquiries in violation of 47 U.S.C. § 308(b) and 47 C.F.R. § 1.17.

The Commission makes this determination in the face of a contrary decision and express findings by the ALJ. That ALJ, Judge Chachkin, found that "the Bureau was engaged in a fishing expedition with the hope that something would turn up," that "Kay was being asked to provide virtually every detail regarding the operation of his business[,] . . . include[ing] sensitive information such as his entire customer list and details regarding the technical configuration of each of his customers' system[s]," and that "all of Kay's reasonable requests for modification of the extremely broad inquiry were arbitrarily ignored." *James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area*, Initial Decision of Chief Administrative Law Judge Joseph Chachkin, WT Docket No. 94-147, FCC 99D-04, ¶ 179 ("*Chachkin Decision*"). In addition, Judge Chachkin found that the Bureau's request for information "was received by Kay only two weeks after the Northridge earthquake, a devastating natural disaster that did substantial damage to his business and personal residence" and

that, ultimately, "Kay turned over some 36,000 documents." *Id.* ¶ 180. Finally, Judge Chachkin ruled that Kay's actions were based on "legitimate concerns in Kay's mind whether the data sought would be kept confidential" (*id.* ¶ 181), because, among other things, Kay's competitors had received a copy of the Bureau's inquiry letter to Kay (*id.* ¶ 29) and the Bureau at one point demanded 50 copies of Kay's response (*id.* ¶ 181).

In my view, the Commission goes too far in reversing Judge Chachkin's conclusions. There can be no question that Kay and the Bureau were engaged in a heated dispute. Judge Chachkin made a number of factual determinations to resolve that dispute and determine that Kay did not violate the statute or Commission rules. In such situations, I am reluctant to reverse an ALJ's determinations based on a cold record. It is well established that, generally, the initial trier of fact is "closer to the course of the litigation," *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996), and "has a better 'feel' . . . for the litigation" than a reviewing tribunal, *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1986). Thus, the Commission routinely defers to the ALJ on these sorts of decisions. *See*, *e.g.*, *Applications of WWOR-TV, Inc. for Renewal of License of Station WWOR(TV), Secaucus, New Jersey and Garden State Broadcasting Limited Partnership for Construction Permit, Secaucus, New Jersey*, Memorandum Opinion and Order, 5 FCC Rcd 4113, ¶ 11 (1990) ("[W]e are reluctant to reverse the ALJ, to whom broad discretion is ceded in ordering discovery . . . ."); *Applications of Mid-Ohio/Capitol Communications Limited Partnership et al. for Construction Permit for a New FM station on Channel 298A in Columbus, Ohio*, Memorandum Opinion and Order, 4 FCC Rcd 8125, ¶ 6 (1989) ("[T]he Commission routinely entrusts the determination of the scope of such discovery in comparative hearings to the broad discretion of the ALJ."). Indeed, this principle of deference extends well beyond the FCC; in the similar arena of discovery disputes, appellate tribunals traditionally afford great deference to the decisions of the trial court. *See*, *e.g.*, *United States v. Davis*, 244 F.3d 666, 670 (8th Cir. 2001) ("The district court has broad discretion in imposing sanctions on parties for failing to comply with discovery orders."); *accord Bonds*, 93 F.3d at 807. Accordingly, on this record, I would not have reversed the ALJ's decision.

II. Lack of Candor

The Commission's lack of candor decisions against Kay and Sobel stem from other events in this case. During the course of the Bureau's investigation of Kay, it received information indicating that Kay may have conducted business under several other people's names, including Marc Sobel's. The Commission thus included Sobel's licenses in the order designating Kay's licenses for hearing. Kay filed a motion to remove Sobel's licenses from the hearing designation and attached an affidavit signed by Sobel stating that Kay had no interest in any of Sobel's stations. Based on this submission, the Commission removed Sobel's licenses from the Kay proceeding.

The Bureau subsequently discovered that Kay operated a number of Sobel's stations pursuant to a management agreement. Accordingly, the Commission designated Sobel's licenses for hearing, asking whether Sobel had engaged in misrepresentation or

lack of candor. The ALJ assigned to Sobel's case, Judge Frysiak, concluded that Sobel's actions showed a lack of candor. Judge Frysiak based that determination on, among other things, statements in the affidavit and on Sobel's apparent failure to provide the Bureau the management agreement in a timely manner.

However, Judge Chachkin, in *later* reviewing the same conduct in Kay's case, came to the opposite conclusion. Judge Chachkin found that Kay understood the affidavit's statement that Kay had no interest in any of Sobel's stations to mean that Kay had no ownership interest in any licenses that were issued to Sobel. *Chachkin Decision* ¶ 216. Judge Chachkin determined that "Kay was specifically advised, by counsel, that . . . the management agreement did not constitute an interest." *Id.* ¶ 172. He thus concluded that "Kay's testimony as to what he meant by the word 'interest' and the phrase 'stations or licenses' is entirely reasonable and credible." *Id.* ¶ 216.

Judge Chachkin also found that Kay's and Sobel's actions showed no intent to deceive the Bureau or conceal the management agreement. He pointed out that Kay and Sobel provided the management agreement to the Bureau just two months after they filed the challenged motion and accompanying affidavit, long before anyone raised any questions about lack of candor. *Id.* ¶ 217.

Finally, Judge Chachkin addressed Judge Frysiak's prior decision on the lack of candor issue and concluded that Judge Frysiak had been misled by the Bureau. Judge Chachkin explained that, although Kay had provided the Bureau a copy of the management agreement in March of 1995, the Bureau represented to Judge Frysiak that no copy was provided until late 1996. *Id.* ¶ 210. "There is no doubt," Judge Chachkin concluded, "that [Judge Frysiak's] ultimate conclusion that 'Sobel made misrepresentations and lacked candor . . .' was based on his erroneous assumption as to when the Agreement was given to the Bureau." *Id.* ¶ 210.

Based on these conflicting decisions and on Judge Chachkin's view that Judge Frysiak was misled, I cannot support this decision. As the Commission acknowledges, determinations of credibility must rest in large part on factual determinations made by an ALJ. I am unable, on the record before us, to reconcile the ALJ's conflicting decisions and determine that Judge Frysiak was not misled.[1] Particularly given the severity of the sanctions at issue, I would not find that Kay and Sobel lacked candor.

III. Conclusion

[1] I also take issue with the Commission's conclusion that Judge Frysiak would not have made a different decision had he known Kay and Sobel provided the Bureau a copy of the management agreement in March of 1995, long before lack of candor was an issue. Judge Frysiak's decision explicitly rests in part on the determination that "even though the Management Agreement fully disclosed their relationship, Sobel did not voluntarily submit it to the Commission until requested by the Commission to do so in [1996]." *Marc Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area*, Decision, WT Docket No. 97-56, FCC 97D-13, ¶ 74. While this may not have been the largest factor in Judge Frysiak's decision, I find it impossible to assess its impact after the fact. I do not understand how my colleagues, on the record before us, can make such a conclusion on Judge Frysiak's state of mind.

At best, this is a case of conflicting opinions by ALJs that ought to be remanded to a third ALJ to reconcile their determinations. Even worse, however, this case involves allegations that Commission staff misled a judge into reaching an erroneous conclusion. While I am confident that Commission staff engaged in no misconduct in this case, we do them a disservice by depriving them of an opportunity, in a new hearing, to explain what occurred. Such a hearing would defend the reputation of our staff and ensure the integrity of our process. Thus, for all of these reasons, the more reasonable course would be to refer this case for a hearing in front of a new ALJ. Accordingly, I dissent from parts IV, VII, VIII, and IX of the Kay Order and from parts V, VI, and VII of the Sobel Order. I concur with respect to the other parts of these Orders.